Kebabangan Petroleum Operating Co Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(C)(A)-1836–09 OF 2022 AND W-02(C)(A)-1837–09 OF 2022
MARIANA YAHYA, AZIMAH OMAR AND WAN AHMAD FARID JJCA
14 MAY 2025

Arbitration — Award — Challenge on award — Final award awarded by tribunal — Appellant's application to enforce final award dismissed and respondent's application to set aside final award allowed by High Court — Whether tribunal breached rules of natural justice by disregarding expert opinions and submissions regarding quantification of damages — Whether tribunal adequately considered respondent's arguments regarding waiver, acquiescence, and estoppel — Whether tribunal erred in failing to address issue of whether appellant had taken appropriate steps to mitigate its losses — Whether tribunal's failure to provide adequate reasons for its award constituted breach of arbitral procedure

By a contract in 2011 for the fabrication of KBB Topsides, Kebabangan Petroleum Operatic Co Sdn Bhd ('Kebabangan') appointed Sime Darby Engineering Sdn Bhd as the contractor. The contract was then novated to the respondent, Malaysia Marine and Heavy Engineering Sdn Bhd ('MMHE'). Under the contract, MMHE was required to supply 2" below and 3" above manual ball valves. The valves were to be procured from Mikuni (M) Sdn Bhd with OMB Valves SpA, of Italy as the manufacturer. Works pursuant to the contract were completed in June 2014. However, disputes arose upon Kebabangan's discovery in April 2016 that the manual valves were, in fact, not OMB valves and were of unknown origin. The dispute was then referred to arbitration in March 2019. In essence, Kebabangan's case against MMHE was: (a) MMHE were obliged to procure OMB valves from Mikuni; (b) the manual valves supplied by MMHE were not OMB valves and were, in fact, of unknown origin; and (c) as a result of the foregoing, Kebabangan suffered loss and damage. At the end of the arbitral proceedings, the tribunal concluded that: (i) the valves under the contract had to be OMB valves; and (ii) in breach of the contract, MMHE delivered valves that were not OMB valves. By a final arbitral award ('the final award'), the tribunal awarded Kebabangan, inter alia, RM17,241,178.02 as damages for expenses incurred by Kebabangan for assessment, procurement and replacement of valves in the period 2016 to 2019 ('claim 1'). Kebabangan applied to enforce the final award while MMHE applied to set aside the final award. At the High Court, the learned judge dismissed Kebabangan's application and allowed MMHE's application. The

learned judge found that: (1) the final award was in breach of natural justice under s 37 of the Arbitration Act 2005 ('the AA') on three counts in that the tribunal failed to consider or make a finding on MMHE's arguments on: (A) quantification of claim 1; (B) the issue of waiver, acquiescence and estoppel; and (C) whether Kebabangan mitigated its losses; and (2) the tribunal failed to make a finding and a reasoned award as envisaged by s 33(3) of the AA and article 34(3) of the UNCITRAL Arbitration Rules adopted by the AIAC Arbitration Rules 2018. Hence, these two appeals by Kebabangan ie Appeal 1836 against the decision in dismissing Kebabangan's application to recognise and enforce the final award and Appeal 1837 against the decision in allowing the MMHE's application to set aside the final award.

Held, dismissing the appeals:

(1) While the tribunal was not bound to accept the position advanced by either expert, it would only be fair to expect the tribunal to discuss each subclaim under claim 1. The tribunal was in breach of the rules of natural justice in connection in concluding of the award since it had disregarded the opinion of the parties' experts and the submissions made by the parties on the issues in respect of each of the subclaim in claim 1. The material disputations between the expert witnesses with respect to each subclaim in claim 1 were not mere arguments or even submissions that need not be individually responded to. On the contrary, these were material elements and specifically pleaded defences relied on by MMHE, which the tribunal had failed to determine that would have affected the award in claim 1. The breach of natural justice was, therefore, significant and had the real impact on the outcome of the arbitral proceedings (see paras 17–20).

(2) The failure of the tribunal in dealing with the issues raised by MMHE constituted a serious breach of natural justice in connection with the making of the award and was material to the outcome of the arbitral proceedings. While natural justice did not require MMHE to be given responses to all submissions made before the tribunal, the failure of the tribunal to specifically address the issues raised by MMHE was of significance that could have impacted the outcome of the arbitral proceedings (see paras 23–24).

(3) Despite the specific pleadings on the issue of mitigation made by the parties, it was not addressed by the tribunal. Such a failure amounted to a breach of the rules of natural justice. Had the tribunal addressed MMHE's contention on mitigation, it could have resulted in a reduction of the quantum of the award (see para 26).

(4) The failure of the tribunal was more than mere failing to provide adequate reasons and explanations. The arbitral tribunal did not assign any reason, let alone a cogent one, in awarding a sum much higher than

the assessment made by Kebabangan's own expert witness. Such a departure, without assigning any reasons thereto, was more than a mere error of law. It came within the ambit of article 34(3) of the UNCITRAL Arbitration Rules and s 33(3) of the AA. A challenge on the award could, therefore, be sustained (see paras 29–31).

[Bahasa Malaysia summary

Berdasarkan kontrak pada tahun 2011 untuk fabrikasi KBB Topsides, Kebabangan Petroleum Operatic Co Sdn Bhd ('Kebabangan') telah melantik Sime Darby Engineering Sdn Bhd sebagai kontraktor. Kontrak itu kemudiannya digantikan kepada responden, Malaysia Marine and Heavy Engineering Sdn Bhd ('MMHE'). Di bawah kontrak tersebut, MMHE dikehendaki membekalkan injap bebola manual berukuran 2" ke bawah dan 3" ke atas. Injap-injap tersebut sepatutnya diperolehi daripada Mikuni (M) Sdn Bhd dengan OMB Valves SpA, dari Itali sebagai pengeluar. Kerja-kerja menurut kontrak telah disiapkan pada Jun 2014. Walau bagaimanapun, pertikaian timbul apabila Kebabangan mendapati pada April 2016 bahawa injap-injap manual tersebut sebenarnya bukan injap OMB dan tidak diketahui asalnya. Pertikaian itu kemudiannya dirujuk kepada timbang tara pada Mac 2019. Inti pati kes Kebabangan terhadap MMHE adalah: (a) MMHE diwajibkan mendapatkan injap OMB daripada Mikuni; (b) injap manual yang dibekalkan oleh MMHE bukan injap OMB dan sebenarnya tidak diketahui asalnya; dan (c) akibat daripada perkara di atas, Kebabangan mengalami kerugian dan kerosakan. Pada akhir prosiding timbang tara, Tribunal membuat kesimpulan bahawa: (i) injap-injap di bawah kontrak mestilah injap OMB; dan (ii) dengan melanggar kontrak, MMHE telah menghantar injap yang bukan injap OMB. Melalui award timbang tara akhir ('award akhir'), tribunal telah menganugerahkan kepada Kebabangan antaranya RM17,241,178.02 sebagai ganti rugi untuk perbelanjaan yang ditanggung oleh Kebabangan bagi penilaian, perolehan dan penggantian injap dalam tempoh 2016 hingga 2019 ('tuntutan 1'). Kebabangan memohon untuk menguatkuasakan award akhir manakala MMHE memohon untuk mengetepikan award akhir tersebut. Di Mahkamah Tinggi, hakim yang bijaksana telah menolak permohonan Kebabangan dan membenarkan permohonan MMHE. Hakim yang bijaksana mendapati bahawa: (1) award akhir melanggar keadilan semula jadi di bawah s 37 Akta Timbang Tara 2005 ('ATT') atas tiga kiraan kerana tribunal gagal mempertimbangkan atau membuat penemuan mengenai hujah-hujah MMHE mengenai: (A) kuantifikasi tuntutan 1; (B) isu penepian, persetujuan dan estopel; dan (C) sama ada Kebabangan mengurangkan kerugiannya; dan (2) tribunal gagal membuat penemuan dan award yang beralasan seperti yang dibayangkan oleh s 33(3) ATT dan perkara 34(3) Kaedah-Kaedah Timbang Tara UNCITRAL yang diterima pakai oleh Kaedah-Kaedah Timbang Tara AIAC 2018. Oleh itu, kedua-dua rayuan ini oleh Kebabangan iaitu Rayuan 1836 terhadap keputusan dalam menolak permohonan Kebabangan untuk mengiktiraf dan menguatkuasakan award akhir dan Rayuan 1837 terhadap

keputusan dalam membenarkan permohonan MMHE untuk mengetepikan award akhir.

Diputuskan, menolak rayuan:

(1) Walaupun tribunal tidak terikat untuk menerima kedudukan yang dikemukakan oleh mana-mana pakar, adalah adil untuk menjangkakan tribunal membincangkan setiap tuntutan kecil di bawah tuntutan 1. Tribunal telah melanggar peraturan keadilan semula jadi berkaitan dengan membuat kesimpulan award itu kerana ia telah mengabaikan pendapat pakar pihak-pihak dan hujah yang dibuat oleh pihak-pihak mengenai isu-isu berkenaan setiap tuntutan kecil dalam tuntutan 1. Pertikaian material antara saksi pakar berkenaan setiap tuntutan kecil dalam tuntutan 1 bukanlah sekadar perdebatan atau hujahan yang tidak perlu dijawab secara individu. Sebaliknya, ini adalah unsur material dan pembelaan yang diplid secara khusus yang diandalkan oleh MMHE, yang tribunal telah gagal untuk menentukan yang akan menjejaskan award dalam tuntutan 1. Oleh itu, pelanggaran keadilan semula jadi adalah signifikan dan mempunyai impak yang sebenar terhadap hasil prosiding timbang tara (lihat perenggan 17–20).

(2) Kegagalan tribunal dalam menangani isu-isu yang dibangkitkan oleh MMHE merupakan pelanggaran serius terhadap keadilan semula jadi berkaitan dengan pembuatan award dan adalah material kepada hasil prosiding timbang tara. Walaupun keadilan semula jadi tidak memerlukan MMHE diberikan respons kepada semua hujah yang dibuat di hadapan tribunal, kegagalan tribunal untuk menangani secara khusus isu-isu yang dibangkitkan oleh MMHE adalah signifikan yang boleh memberi kesan kepada hasil prosiding timbang tara (lihat perenggan 23–24).

(3) Walaupun terdapat pliding khusus mengenai isu mitigasi yang dibuat oleh pihak-pihak, ia tidak ditangani oleh tribunal. Kegagalan sedemikian adalah pelanggaran peraturan keadilan semula jadi. Sekiranya tribunal menangani hujah MMHE mengenai mitigasi, ia boleh mengakibatkan pengurangan kuantum award (lihat perenggan 26).

(4) Kegagalan tribunal adalah lebih daripada sekadar gagal memberikan alasan dan penjelasan yang mencukupi. Tribunal timbang tara tidak memberikan apa-apa alasan, apatah lagi alasan yang kukuh, dalam menganugerahkan jumlah yang jauh lebih tinggi daripada penilaian yang dibuat oleh saksi pakar Kebabangan sendiri. Penyimpangan sedemikian, tanpa memberikan apa-apa alasan mengenainya, adalah lebih daripada sekadar kesilapan undang-undang. Ia termasuk dalam skop perkara 34(3) Kaedah-Kaedah Timbang Tara UNCITRAL dan s 33(3) ATT. Oleh itu, cabaran terhadap award boleh dikekalkan (lihat perenggan 29–31).]

Cases referred to

CVV & Ors v CWB [2023] SGCA(I) 9, CA (refd)
Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413, FC (refd)
Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan and another summons [2020] MLJU 660; [2020] CLJU 528, HC (refd)
JY Creative Sdn Bhd v MEACS Construction Sdn Bhd and another case [2022] MLJU 941; [2022] 1 LNS 945, HC (refd)
Pacific Recreation Pte Ltd v SY Technology Inc [2008] 2 SLR(R) 491, CA (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)

Legislation referred to

Arbitration Act 2005 ss 33(3), 34(3), 37, 37(1)(a)(vi), (1)(b)(ii), (2)(b)(ii)

Appeal from: *Kebabangan Petroleum Operating Company Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd and another case* [2023] MLJU 1995 (High Court, Kuala Lumpur)

Wilfred Abraham (with Kuhendran Thanapalasingam and Agesh Jeyaratnam) (Zul Rafique & Partners) for the appellant.
Cyrus Das (with Mohanadass Kanagasabai, Kalashini Sandrasegaran and Thomas Shaun Mathews) (Mohanadass Partnership) for the respondent.

Wan Ahmad Farid JCA:

[1] There are two appeals before us which are heard together.

[2] The first appeal is W-02(C)(A)-1836–09 of 2022 ('Appeal No 1836') and the second appeal is W-02(C)(A)-1837–02 of 2022 ('Appeal No 1837').

[3] Appeal No 1836 is filed by the appellant, Kebabangan Petroleum Operatic Co Sdn Bhd ('Kebabangan'), against the decision of the Kuala Lumpur High Court dated 30 August 2022 in dismissing the appellant's application to recognise and enforce a final arbitral award dated 23 July 2021 ('final award') as a judgment. Appeal No 1837 is the appellant's appeal against the decision of the same court in allowing the respondent's application to set aside the final award.

THE FACTUAL BACKGROUND

[4] The brief factual background that leads to these appeals is as follows. By a contract in 2011 for the Fabrication of KBB Topsides, Kebabangan appointed Sime Darby Engineering Sdn Bhd as the contractor. The contract

A was then novated to the respondent, Malaysia Marine and Heavy Engineering Sdn Bhd ('MMHE').

[5] Under the contract, MMHE was required to supply 2" and below and 3" and above manual ball valves. The valves were to be procured from Mikuni (M) Sdn Bhd with OMB Valves SpA, of Italy as the manufacturer. It is not in dispute that works pursuant to the contract were completed in June 2014.

[6] However, disputes arose upon Kebabangan's discovery in April 2016 that the manual valves were, in fact, not OMB valves and were of unknown origin.

[7] The dispute was then referred to arbitration in March 2019. In essence, Kebabangan's case against MMHE was:

(a) MMHE were obliged to procure OMB valves from Mikuni;

(b) the manual valves supplied by MMHE were not OMB valves and are, in fact, of unknown origin; and

(c) as a result of the foregoing, KPOC suffered loss and damage.

[8] At the end of the arbitral proceedings, the tribunal concluded that: (a) the valves under the contract had to be OMB valves; and (b) in breach of the contract, MMHE delivered valves that were not OMB valves.

[9] By the final award dated 23 July 2021, the tribunal awarded Kebabangan:

(a) RM17,241,178.02 as damages for expenses incurred by KPOC for assessment, procurement and replacement of valves in the period 2016 to 2019 ('claim 1');

(b) interest calculated at 5%pa from 11 October 2019 on the sum of RM17,241,178.02;

(c) RM9,820,770 as damages suffered by KPOC in having to procure 1365 valves and install 1454 valves in the future ('claim 2');

(d) interest on the sum of RM9,820,770 at the rate of 5%pa from 11 October 2019; and

(e) RM1,029,167.25 for KPOC's legal fees and expenses.

[10] On 29 September 2021, Kebabangan applied to enforce the final award. On 30 September 2021, MMHE applied to set aside the final award.

AT THE HIGH COURT

[11] On 30 August 2022, the learned judge dismissed Kebabangan's application and allowed MMHE's application. Hence, the two appeals before us.

[12] In allowing MMHE's application to set aside the final award, the learned High Court judge found that:

(a) the final award was in breach of natural justice under s 37 of the Arbitration Act 2005 ('the AA') on three counts in that the tribunal failed to consider or make a finding on MMHE's arguments on:

(i) quantification of claim 1;

(ii) the issue of waiver, acquiescence and estoppel; and

(iii) whether Kebabangan mitigated its losses.

(b) the tribunal failed to make a finding and a reasoned award as envisaged by s 33(3) of the AA and article 34(3) of the UNCITRAL Arbitration Rules adopted by the AIAC Rules 2018.

[13] According to the learned judge, the tribunal was in breach in connection with the making of the final award as the tribunal (in concluding the final award) had disregarded the opinion of the parties' experts and the submissions made by the parties on the issues in respect of each of the subclaim under claim 1. The breach, the learned judge found, was a serious one. The learned judge was of the view that had the tribunal considered and made known its findings on each of the subclaims, it may well be that the tribunal would not have awarded the full amount as claimed by Kebabangan.

[14] The High Court further held that the tribunal was in breach of the rules of natural justice by not addressing the issue of mitigation, which was material to the outcome of the arbitration.

AT THE COURT OF APPEAL

[15] Before us, the learned counsel for Kebabangan submitted as follows:

(a) the final award was set aside because the claim for RM17m was allowed, although experts opined it should be RM14m. The learned judge erroneously held that the tribunal failed to consider or make a finding in the final award on MMHE's arguments on the quantification of claim 1. The learned counsel contended that the learned judge was mistaken in drawing parallels with *Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan and another summons* [2020] MLJU

660; [2020] CLJU 528, where the arbitrator awarded a sum of RM12m when the sum claimed was only RM6m. According to the learned counsel, the duty to give reasons is not part of natural justice. In any event, the learned counsel contended that the tribunal had appropriately awarded Kebabangan the sum claimed as per its statement of claim and nothing more;

(b) the High Court had erred in finding that the tribunal failed to consider MMHE's arguments on waiver, acquiescence and estoppel. According to the learned counsel for the appellant, the tribunal had already considered the issue of waiver, acquiescence and estoppel when it considered MMHE's contention that having accepted the valves, it was too late in the day for Kebabangan to allege a breach of contract. This is particularly so since no defects were detected in the valves apart from the claim that they were not from OMB. The learned counsel contended that even if there was an absence of findings by the tribunal on the question posed by MMHE on waiver, acquiescence and estoppel, natural justice does not require MMHE to be given responses to all submissions. In the circumstances, the learned counsel contended that the learned judge had erred in setting aside the final award on the basis that Kebabangan had waived the shortcomings by accepting the valves and by the issuance of the certificate of completion ('COC'), Kebabangan was estopped from contending otherwise;

(c) the High Court had also erred in holding that the tribunal failed to consider or otherwise make a finding in the final award on MMHE's argument on whether Kebabangan mitigated its loss. The learned counsel submitted that the tribunal had indeed considered and made findings on mitigation in the final award. This is so when the tribunal made it clear that 'future purchase and installation of the remaining valves are reasonable on the facts of the case'; and

(d) the learned counsel for Kebabangan contended that the High Court had erroneously held that the arbitral procedure was not in accordance with s 34(3) of the AA and article 34(3) of the UNCITRAL Arbitration Rules adopted by the AIAC Rules 2018 in failing to make a reasoned award for claim 1. Relying on *JY Creative Sdn Bhd v MEACS Construction Sdn Bhd and another case* [2022] MLJU 941; [2022] 1 LNS 945 and *CVV & Ors v CWB* [2023] SGCA(I) 9, the learned counsel reiterated the propositions that the duty to give reasons is not part of natural justice and failure to provide reasons is merely an error in law.

[16] As to the first ground, we take note that the tribunal did not make any attempt to appreciate any of the arguments with respect to the sum of RM27,241,178.02 being the component of subclaims. What was more glaring was there was no explanation from the tribunal as to how did it arrive at the

claimed amount of RM27,241,178.02 when Kebabangan's expert witness had assessed and valued Kebabangan's claim at RM14,162,655.

[17] While we agree that the tribunal is not bound to accept the position advanced by either expert, as pointed out by the learned judge, it would only be fair to expect the tribunal to discuss each subclaim under claim 1. The subclaims in claim 1 are based on their own respective set of evidence, supporting documents and computation.

[18] In the circumstances of the case, we respectfully agree with the learned judge that the tribunal was in breach of the rules of natural justice in connection in concluding of the award since it had disregarded the opinion of the parties' experts and the submissions made by the parties on the issues in respect of each of the subclaim in claim 1. As stated by the Singapore Court of Appeal in *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 (CA), a breach of natural justice occurs if, in the course of reaching its decision, the tribunal disregarded the submissions and arguments made by the parties on the issues without considering the merits thereof. As correctly pointed out by the learned judge, had the tribunal considered and made known its findings on each of the subclaims, it may well be that the tribunal would not have awarded the full amount as claimed by Kebabangan.

[19] In the context of the instant appeal, the material disputations between the expert witnesses with respect to each subclaim in claim 1 were not mere arguments or even submissions that need not be individually responded to as contended by the learned counsel for Kebabangan. On the contrary, these are material elements and specifically pleaded defences relied on by MMHE, which the tribunal had failed to determine that would have affected the award in claim 1.

[20] The breach of natural justice is, therefore, significant and has the real impact on the outcome of the arbitral proceedings.

[21] As to the tribunal's failure to consider MMHE's arguments on waiver, acquiescence and estoppel, the learned counsel for Kebabangan contended that since the tribunal found that the valves were discovered to be not being from OMB was only in April 2016, Kebabangan would not have waived, acquiesced or should be estopped from something it was not aware of.

[22] There were three questions posed by MMHE at the tribunal. The three questions are as follows:

(a) whether the issuance of COC amounts to a representation by Kebabangan that they are satisfied with the completion of the works and

A are now estopped from contending otherwise, including in placing reliance on cl 2.6 Part 2 of the contract?

(b) whether Kebabangan had waived shortcomings, if any, in terms of the performance of the works by way of accepting the valves and the issuance of COC, save in respect of any continuing obligations; and

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(c) whether Kebabangan had accepted any shortcomings and/or deviations from the KBB contract during the course of the contract by, inter alia, making payment and accepting the valves? Whether Kebabangan should be estopped from asserting otherwise.

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[23] Unfortunately, the tribunal failed to deal with these three issues raised by MMHE. We therefore respectfully agree with the learned judge that such a failure constitutes a serious breach of natural justice in connection with the making of the award and is material to the outcome of the arbitral proceedings. In making the finding, the learned judge did not descend from the bench as if she was acting in an appellate capacity. On the contrary, the finding was anchored on the failure of the tribunal to address the pertinent issues raised by MMHE.

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[24] While we recognise that natural justice does not require MMHE to be given responses to all submissions made before the tribunal, the failure of the tribunal to specifically address the three issues raised by MMHE is of significance that could have impacted the outcome of the arbitral proceedings.

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[25] As to whether Kebabangan had mitigated its loss, we take cognisance that the issue was clearly pleaded and submitted by the parties. MMHE, in para 68 of its statement of defence, averred that Kebabangan had failed to take any mitigation measures to reduce or minimise any losses it allegedly incurred. On the other hand, Kebabangan, in para 49 of its statement of reply, pleaded that it had satisfied its duty to mitigate, which included prioritising the replacement of valves based on the safety and criticality of the valves.

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H **[26]** Unfortunately, despite the specific pleadings on the issue of mitigation made by the parties, it was not addressed by the tribunal. We respectfully agree with the learned judge that such a failure amounts to a breach of the rules of natural justice. Our reason is this. Had the tribunal addressed MMHE's contention on mitigation, it could have resulted in a reduction of the quantum of the award.

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[27] Finally, Kebabangan took issue against the finding of the learned judge that the arbitral procedure was not in accordance with the agreement of the parties. The agreed arbitral procedure is as follows:

(a) article 34(3) of the UNCITRAL Arbitration Rules as part of the AIAC Arbitration Rules 2018. The Art provides that the arbitral tribunal shall state the reasons upon which the award is based upon unless the parties have agreed that no reasons are to be given; and

(b) likewise, s 33(3) of the AA provides that an award shall state the reasons upon which it is based unless: (i) the parties have agreed that no reasons are to be given; or (ii) the award is an award on agreed terms under s 32.

[28] The learned counsel for Kebabangan argued that the duty to give reasons is not part of natural justice and that a failure to provide reasons is merely an error of law. The ratio in *CVV*, the Singapore case relied on by the learned counsel for Kebabangan, is that the inadequate provision of reasons and explanations is, at the very most, a mere error of law. In short, an allegation of the same, on its own, is incapable of sustaining a challenge against the entirety of an award.

[29] In our view, the failure of the tribunal is more than mere failing to provide adequate reasons and explanations. It is beyond that. As alluded to earlier, the final award, even taken at its highest, does not inform the parties of the basis in which the tribunal arrived at its decision with respect to the quantification of claim 1. At the risk of being repetitive, the award does not explain how did the tribunal reach the sum of RM17,241,178.02, being the component subclaims and whether Kebabangan has proven its loss for the purpose of assessment and quantification of the same amount. This is even more so considering Kebabangan's expert itself stood on record in assessing Kebabangan's claim at a much lower amount in the sum of RM14,162,655.

[30] Make no mistake. It is trite that a tribunal, just like a court, is not bound to accept expert evidence. However, if an expert opinion is accepted or rejected, a tribunal must give a cogent reason for doing so: see *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 (SC). In the instant appeal, the arbitral tribunal did not assign any reason, let alone a cogent one, in awarding a sum much higher than the assessment made by Kebabangan's own expert witness.

[31] In our considered view, such a departure, without assigning any reasons thereto, is more than a mere error of law. It goes beyond that. It comes within the ambit of article 34(3) of the UNCITRAL Arbitration Rules and s 33(3) of the AA. A challenge on the award can, therefore, be sustained.

CONCLUSION

[32] The Federal Court in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 (FC) made it clear that s 37(2)(b)(ii) of

A the AA specifically categorises a breach of the rules of natural justice which occurred in connection with the making of an arbitral award as being in conflict with the public policy of Malaysia. If established, as in the instant appeal, it can be a ground to set aside an arbitral award.

B **[33]** We therefore agree with the findings of the learned judge that:

(a) the award is in conflict with the public policy of Malaysia in that a breach of the rules of natural justice had occurred in connection with the making of the award pursuant to s 37(1)(b)(ii) and 37(2)(b)(ii) of the AA
C when the tribunal failed to consider and make a finding on MMHE's arguments:

(i) on the quantification of the damages on claim 1;

(ii) the issues of waiver, acquiescence and estoppel; and

D (iii) whether KPOC had mitigated its loss.

(b) the arbitral procedure was not in accordance with the agreement of the parties pursuant to s 37(1)(a)(vi) of the AA, as the tribunal failed to make a reasoned award in respect of claim 1.

E **[34]** For the foregoing reasons, we find no appealable error on the part of the learned judge in setting aside the arbitral award in Appeal No 1837 and the dismissal of Kebabangan's enforcement application in Appeal No 1836.

F **[35]** Both of the appeals are, therefore, dismissed with costs as follows:

(a) Appeal No 1837: RM50,000; and

(b) Appeal No 1836: RM15,000 subject to allocatur.

G *Appeals dismissed.*

Reported by Nabilah Syahida Abdullah Salleh

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